LEE WENG TUCK & ANOR.

v.

PUBLIC PROSECUTOR

SUPREME COURT, KUALA LUMPUR
MOHD. AZMI SCJ
HARUN HASHIM SCJ
AJAIB SINGH SCJ
[CRIMINAL APPEAL NO. 42/88]
12 APRIL 1989

CRIMINAL PROCEDURE: *Withdrawal of plea of guilty - Importance of statement of facts given by the prosecution - Principles applicable in consideration of withdrawal of plea - Proper safeguards to be taken in accepting plea of guilty.*

The 2 appellants were jointly charged with one Ooi for trafficking in dangerous drugs in furtherance of a common intention. Both appellants were convicted and sentenced to death. The punishment upon conviction was either life imprisonment or death.

The appellants were at all times represented by Counsel. The appellants initially pleaded not guilty. After the evidence in chief of the prosecution's first witness the appellants indicated through Counsel to the Court that they wished to change their plea to guilty. The Judge adjourned the matter and at the next date the appellants pleaded guilty. The Judge's notes showed that the appellants understood the charge and the consequences and nature of their plea - the notes also showed that the facts were explained and admitted by the appellants and that the Judge had accepted their pleas.

During the plea in mitigation, a doctor was called to testify on the mental state of the 1st appellant - the Judge ordered that the 1st appellant be remanded for 2 weeks and adjourned the matter.

At the adjourned date, the 1st appellant was certified fit but Counsel applied to the Court to retract the pleas of both appellants on the following grounds:

1st appellant - did not understand charge, he was not feeling well and did not realise that he was pleading guilty to a charge which might carry a death sentence; and

2nd appellant - surprised by statement of facts by DPP.

The Judge took time to consider the application, refused the same and found no extenuating circumstances to merit the lesser sentence of life imprisonment.

The statement of facts given by the DPP and admitted by the appellants showed admission that on the date and place stated in the charge they were arrested in 2 separate cars - the 2nd appellant was the driver of a car which contained 10.6 gm of heroin together with other incriminating exhibits.

Ooi was the driver of the other car where the 1st appellant was a passenger. 5,262 gms of heroin was found here in a secret compartment together with other exhibits and 6,861 gm of caffeine.

In and around a wooden shed about half a mile away further incriminating evidence was found - police investigations revealed that both appellants were at the shed with Ooi the evening before and that they were jointly trafficking in 5,253 gms of heroin.

Held:

[1] In the case of *Reg v. Mc Nally* relied upon the Judge there was obviously no grounds for the Court to allow the accused there to withdraw the plea - further the trial of the sole accused there claiming trial enabled the Judge to have all the relevant facts before him as the Judge there dealt with the withdrawal of plea after the trial of the said accused.

[2] The Judge has a discretion to allow a plea of guilty to be withdrawn but must exercise the same judicially and on valid grounds, depending on the facts and circumstances of each case, for example, if there was a question of mistake or misunderstanding or that it would be desirable on any ground that the accused should be allowed to join issue.

[3] The *functus officio* argument cannot have any application in considering a withdrawal of plea of guilty before sentence where the conviction and sentence are before the same Court.

[4] Where the plea is equivocal, i.e. where it is not clear, or is doubtful or qualified, the plea must in law be treated as one of not guilty and the Court shall proceed to try the case.

[5] A Judge can accept a plea of guilty in capital cases.

[6] The safeguards for ensuring that a plea of guilty is valid and unequivocal are:

(a) the Court must ensure that it is the accused himself who wishes to plead guilty;

(b) the Court must ascertain that accused understands the nature and consequences of his plea; and

(c) the Court must ascertain that the accused intends to admit without qualification the offence against him.

[7] Even if the accused is represented by Counsel, in capital cases there must be something on record to show 6(b) above - it also cannot be presumed that the accused actually knew the consequences of his plea of guilty.

[8] In capital cases, it is suggested that the Court read the statement of facts to ascertain whether the facts alleged amount to an offence as contained in the charge - if the accused admits the statement with qualification or his admission is not clear or doubtful, then the Court should proceed with trial.

[9] The reasons given by the 1st appellant for wanting to withdraw his plea showed that he did not understand the nature and consequences of his plea - the records do not indicate that the appellants had been told or knew that the offence to which he had pleaded guilty carried the death sentence although it was not mandatory and about the current sentencing policy on trafficking in drugs which imposes the death sentence in the absence of most exceptional circumstances - there was therefore a breach of proper safeguards rendering the plea invalid.

[10] The reasons by the 2nd defendant showed that he did not admit the statement of facts, and even if he did, the admission was with qualification.

[11] The statement of facts here was defective as it was completely silent about the alleged commission of trafficking in furtherance of a common intention - it also did not disclose what the appellants were supposed to be doing at the shed.

[12] The appellants were not given the opportunity to deny that they were involved in manufacture of heroin in the shed, a missing link added by the Judge in his written judgment.

[13] There was therefore a breach of proper safeguards and the appeal is allowed.

Cases referred to:
Toh Ah Loh & Mak Thim v. Rex [1949] MLJ 54
See Ah Ann v. PP [1950] MLJ 293
Loh Hock Seng v. Public Prosecutor [1980] 2 MLJ 13
Public Prosecutor v. Oo Leng Swee & Ors. [1981] 1 MLJ 247
Chang Liang Sang & Ors. v. Public Prosecutor [1982] 2 MLJ 231
Public Prosecutor v. Tan Hock Hai [1983] CLJ (Rep) 348
Reg. v. McNally [1954] 1 WLR 933; [1954] 2 All ER 372
PP v. Sam Kim Kai [1960] MLJ 265
Abdul Mormin v. Public Prosecutor [1939] MLJ 248
Wong Sin Yeow v. Public Prosecutor [1968] 1 MLJ 230
S (An Infant) By Parson (his next friend) v. Recorder of Manchester [1970] 2 WLR 21
Public Prosecutor v. Jamalul Khir [1985] 1 MLJ 371
R v. Riley [1963] 3 All ER 949
Rex v. Tan Thian Chai & Anor. [1932] MLJ 74
Koh Mui Keow v. R [1952] MLJ 214

Legislation referred to:
Criminal Procedure Code ss. 173(b), 178(iii), 342(ii), (iii)
Dangerous Drug Act 1952, s. 39B
Penal Code, s. 34

For the appellant - Mahadevi Nadchatiram; M/s. Mahadevi Nadchatiram & Partners
For the respondent - Su Geok Yaim, DPP; Peguam Negara Malaysia

JUDGMENT

Mohd. Azmi SCJ:

We have allowed this appeal and now proceed to give reasons.

The appeal was against the refusal of the learned trial Judge to permit the withdrawal of plea of guilty by the two appellants who were the 2nd and 3rd accused in the High Court. They were jointly charged with one Ooi Lam Chin ("Ooi" for short) who was the 1st accused, for trafficking in dangerous drugs in furtherance of a common intention on the following terms:

> That you jointly on 18 March 1983 at about 6 a.m. at Badak Mati, Mukim 4, Sungai Bakap in the District of Nibong Tebal, in the State of Penang, in furtherance of the common intention of you all, did on your own behalf traffic in dangerous drugs, to wit, 5,253 grammes of Heroin, in contravention of s. 39B(1)(a) of the Dangerous Drugs Act 1952 (Revised 1980) thereby committed an offence punishable under s. 39B(2) of the same Act, read with s. 34 of the Penal Code.

Both the appellants were convicted and sentenced to death. It should be noted at this stage that the Dangerous Drugs Act 1952 was amended by Act A553 on 14 April 1983 which *inter alia* made offences under s. 39B punishable with mandatory death sentence. Since the offence alleged to have been committed by the appellants and Ooi was prior to the amendment, they were liable on conviction either to life imprisonment or death.

At all relevant times, the appellants and Ooi were represented by Counsel, and when hearing commenced on 5 April 1988 all the three of them had pleaded not guilty. But, after recording evidence-in-chief of Inspector Ng Eng Hoi (PW1), the two appellants through their Counsel had indicated to the Court that they wished to change their plea. The learned trial Judge could have refused to entertain the change of plea and proceeded with the trial to its conclusion.

Alternatively, he could have accepted their plea of guilty but adjourned the sentence until after the trial of Ooi, the co-accused, unless of course they were required to give evidence as witness (see *Toh Ah Loh & Mak Thim v. Rex* [1949] MLJ 54 and See *Ah Ann v. PP* [1950] MLJ 293). In exercise of his discretion, the learned Judge had however decided to deal with the appellants first and adjourned the trial of Ooi.

The appeal record showed that the defence Counsel and the DPP saw the learned Judge - in - chambers at about 2.45 p.m., and there was a request by defence Counsel for time to consider a change of plea by the two appellants. The learned Judge quite properly adjourned the hearing to the following day. When the case resumed on 6 April, the notes of proceeding recorded by the learned Judge read as follows:

> Charge read to the 2nd and 3rd accused separately. Understands the charge.
>
> Both accused plead guilty to the charge.
>
> Understand the consequences and nature of their plea of guilty.
>
> DPP submits facts of the case.
>
> Facts explained and admitted by both the 1st and 2nd accused.
>
> Plea of guilty accepted.
>
> Accordingly, I convict them.

During the plea in mitigation Dr. Rajkumar of the Psychiatric Department, General Hospital Penang, was called and gave evidence on the mental state of the appellant. The doctor testified that the 1st appellant was a dull person with below average intelligence. The learned Judge then made an order under s. 342(ii) and (iii) CPC remanding the 1st appellant for two weeks in a mental hospital for observation, and adjourned the case to 18 April, for sentence.

When the case resumed on 18 April, the 1st appellant was certified fit to plead, but Ms. Mahadevi informed the Court that both the appellants now wished to retract their plea of guilty on the following grounds:

1. 2nd accused (1st appellant) when he instructed Counsel did not understand the charge when read to him. He was feeling giddy and wanted to sit down. He did not realise that he was pleading guilty to a charge which might carry a death sentence.
2. 3rd accused (2nd appellant) wanted to withdraw and to proceed with the trial because he was surprised by the statement of facts by the DPP.

The learned Judge took time to consider the application, and at 2.15 p.m. he made the order refusing to permit the appellants to change their plea.

The learned Judge found no extenuating circumstances to merit the lesser sentence of life imprisonment. In his written judgment, he referred to four decisions of the Federal Court, namely *Loh Hock Seng v. Public Prosecutor* [1980] 2 MLJ 13; *Public Prosecutor v. Oo Leng Swee & Ors*. [1981] 1 MLJ 247; *Chang Liang Sang & Ors. v. Public Prosecutor* [1982] 2 MLJ 231; and *Public Prosecutor v. Tan Hock Hai* [1983] CLJ (Rep) 348. It was in compliance with the current sentencing policy on trafficking in hard drugs, that the learned Judge sentenced both the appellants to death.

At this juncture it is necessary to refer briefly to the statement of facts given by the DPP, to which both the appellants had admitted before the learned Judge. The appellants admitted that on the date and place as stated in the charge, they were arrested in two separate motor

cars. The 2nd appellant was the driver of a Mazda car in which 10.6 grammes of heroin together with other incriminating exhibits were recovered. Ooi was the driver of a Colt Gallant car in which the 1st appellant was a passenger. In this second motor car, the police found 5,262 grammes of heroin in a secret compartment. Other exhibits including a plastic packet containing 6,861 grammes of caffeine were also recovered. On revisiting the scene of arrest, the police found a wooden shed about half a mile away from the place where the two vehicles had been ambushed. They found other incriminating exhibits in and around the shed. Police investigation revealed that the two appellants and Ooi had used the wooden shed on the evening of 17 March 1983 and that they had left the place at about 6.00 a.m. the following morning. Investigation also revealed that they were jointly trafficking in 5,253 grammes of heroin.

The main issues before us were therefore whether the learned Judge was correct in holding that the appellants' plea of guilty was unequivocal, and also whether he was correct in law in refusing to allow the appellants to retract their plea notwithstanding the reasons given.

In his oral judgment the learned trial Judge had relied in *Reg. v. Mc Nally* [1954] 2 All ER 372, for holding that whether a plea of guilty might be withdrawn, was entirely one for the discretion of the trial Judge. Although the power was discretionary, it was pertinent to observe that in *McNally's* case no reason at all was given to the trial Judge by the appellant for wishing to change his plea, and Lord Goddard, CJ in delivering the judgment of the Court of Criminal Appeal also found that it was "obvious" that he had no grounds. Further, in *McNally's* case the appellant and other accused were charged with warehouse breaking and house breaking. They all except one pleaded guilty, but were not sentenced until after the trial of the one accused, who claimed to be tried. As such, the trial Judge had all the relevant facts before him and could see that there was no ground at all for allowing the appellant to withdraw his plea before sentence. It was in these circumstances that the appellate Court upheld the lower Court's decision in refusing the appellant permission to retract his plea.

We had no doubt that *McNally's* case was rightly decided. Although the trial Judge had the power to determine whether a plea might be withdrawn before sentence the power was clearly discretionary and must be exercised judicially and on valid grounds, depending on the facts and circumstances of each case. In fact, in *McNally's* case, Lord Goddard CJ had indicated that the Court should allow an accused person to change his plea of guilty if there was a question of mistake or misunderstanding, or that it would be desirable on any ground that the accused should be allowed to join issue.

Reverting to the appeal before us it was pertinent to note that during the trial, the appellants had retracted their plea on two occasions. The first change of plea from not guilty on 6 April, was accepted without any fuss, but then the second retraction on 18 April, from guilty to the original plea of not guilty had apparently caused some difficulties in determining the proper practice and procedure to be followed. The second important point to note was that, although the death sentence was not mandatory in this case because the alleged offence was committed before the 1983 amendment came into force, in practice the trial Judge was bound by current sentencing policy to pass the death sentence. Lastly, it must be borne in mind that the charge against the appellants had reference to s. 34 of the Penal Code.

In a trial before a single Judge, s. 178 Criminal Procedure Code provides:

> (1) When the Court is ready to commence the trial, the accused shall appear or be brought before it and the charge shall be read and explained to him and he shall be asked whether he is guilty of the offence charged or claims to be tried.

(ii) If the accused pleads guilty the plea shall be recorded, and he may be convicted thereon.

(iii) If the accused refuses to plead or does not plead, or if he claims to be tried, the Court shall proceed to try the case.

There appears to be no provision in the CPC to govern expressly the procedure to be followed when there is a retraction of plea either from a claim to be tried to guilty, or vice versa in the middle of a trial. There was no suggestion in the arguments before us that once the accused had made a plea at the commencement of a trial, the Court had no power to accept any change of such a plea. In non-capital cases, there can be no doubt, that the law in this country has always been that the Courts are empowered to entertain a change of plea, provided the power is exercised judicially and on valid grounds, either at the commencement or in the course of the trial. (See judgment of Rugby J in *PP v. Sam Kim Kai* [1960] MLJ 265 at 267.

In fact in *Abdul Mormin v. Public Prosecutor* [1939] MLJ 248 the Court of Appeal consisting of Poyser CJ, McEiwaine CJ (SS) and Gordon-Smith Ag. JA held at p. 249:

> It is in the discretion of the Magistrate whether he will allow a plea of guilty to be withdrawn. That discretion must be used judicially and it is undesirable to attempt to lay down any hard and fast rule as to how the discretion should be exercised.

However, there had been some doubts as to when the application to withdraw a plea of guilty could validly be made. In *Wong Sin Yeow v. Public Prosecutor* [1968] 1 MLJ 230, Wan Suleiman J (as he then was), expressed the following views:

> It was held in *Abdul Mormin v. Public Prosecutor* that until a Court is *functus officio* it can in a proper case reject a plea of guilty which it may have accepted, and that it is within the discretion of the Court whether or not to allow such a plea to be withdrawn, which discretion must be exercised judicially. I am inclined to the view that in this appeal, having recorded a conviction against the appellant, the learned Magistrate was *functus officio* and cannot therefore permit the plea to be withdrawn.

But, the learned Judge went on to state in the alternative that even if the Magistrate had not been *functus officio*, the discretion to permit an accused person to withdraw a plea of guilty following *Public Prosecutor v. Sun Kim Kai*, there was discretion to allow the retraction of plea before sentence.

Having considered the judgment of the House of Lords in *S (An Infant) By Parson (his next friend) v. Recorder of Manchester* [1970] 2 WLR 21, which was followed by Gun Chit Tuan J (as he then was) in *Public Prosecutor v. Jamalul Khir* [1985] 1 MLJ 371, it seems clear that the *functus officio* argument cannot have any application in considering a withdrawal of a plea of guilty before sentence, where the conviction and sentence are before the same Court. This is inherently clear on careful reading of the judgment in *R v. Riley* [1963] 3 All ER 949 which must be distinguished from *R v. McNally*. It is settled law that a Judge can entertain application by an accused person to retract a plea of guilty at any time before the case is finally disposed of by sentence. In the instant appeal, the learned trial Judge was therefore correct in law when he held that a plea of guilty even though unequivocal might be changed at any time before sentence. We would hasten to add however that the power must be exercised judicially and on valid grounds. It is equally settled practice that where the plea of guilty is equivocal, i.e. where it is not clear, or is doubtful or qualified, the plea must in law be treated as one of not guilty and the Court shall proceed to try the case as required by s. 178(iii) CPC.

Both the DPP and the Counsel for the appellants were unable to show us any authority as to the power of High Court Judges to accept a plea of guilty in capital cases. However, Counsel for the appellants had drawn our attention to the following commentary in *Sarkar Criminal Procedure Code* at p. 451:

> Sub-sec. (2): (Acceptance of Plea of Guilty And Conviction). It is open to the Court to accept or not the plea of guilty. In a capital offence it would be safer not to do so (*Chinna*, 23 M 151, 154; *Gobardhan*, 4 BLR App. 101; *Shankar, A* 1926, A 318: 27 Cr LJ 449; *Achar, A* 1934 S 204; *Hasaruddin, A* 1928 C 775: 30 Cr LJ 508; *Laxnva*, 19 Bom. LR 356) but to accept and pass sentence on a plea of guilty is not illegal (*Manjoo, A* 1923, N 251; *Vishwanath*, 1935 Nag. 492). It is the settled practice not to accept a plea of guilty without examining the accused and finding out whether he really understands to what he was pleading to (*Kassim*, 26 Cr LJ 177; *Keshab*, 18 Cr LJ 742; *Vishwanath*, 46 Cr LJ 357; *Nga Ywa*, 12 R 616; *Abdul Kader, A* 1947, B 345). If proper safeguards are taken, a plea of guilty to a capital charge may be accepted. Such safeguards include representation by Counsel who must be in a position to answer the question of the Court (*Abdul Kader, sup*.). A plea of guilty may be recorded at a later stage of the trial (*Shyama, A* 1934, p. 330).
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> A confession of guilty does not become a plea of guilty unless and until it is accepted. If not accepted, the confession ought not to be recorded. In such cases the practice is to treat it as a plea of not guilty (*Abdul Kader, sup*.; see *Md. Yusuf*, 58 C 1214, 1219) and to proceed with the trial (*Abdul Kader, sup.; Hasaruddin, A* 1928, C 775; *Surjan, A* 1914, A 558; *Chinna*, 23 M 151; *Keshao, A* 1917, O. 362).
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> Where the plea of guilty is not clear, or it is doubtful or qualified, the Court should no doubt proceed with the trial (*Bhadu*, 19 A. 119; *Deoki*, 5 ALJ 157; *Hasaruddin*, 30 Cr LJ 508; 36 Cr LJ 324). As to what amounts to an admission of guilt, see notes to s. 243 *ante*, p. 405. Conviction on a plea of guilty is not sustainable when the facts alleged or proved by the prosecution do not amount to an offence (*Ramaswami*, 1955, 1 MLJ 63: A 1954, M.1020; *Niranjan, A* 1954, C 82; *Bantra, A* 1960, Mys. 177; see notes to S 412 post).

The safeguards referred to in the above commentary are relevant to our s. 173(b) Criminal Procedure Code which provides:

> If the accused pleads guilty to a charge whether as originally framed or as amended the plea shall be recorded and he may be convicted thereon: provided that before a plea of guilty is recorded the Court shall ascertain that the accused understands the nature and consequences of his plea and intends to admit, without qualification, the offence alleged against him.

In the absence of any authority to the contrary, we could not find anything in the Criminal Procedure Code to prevent a Judge of the High Court from accepting a plea of guilty in capital cases, and to pass death sentence on such plea, provided proper safeguards were taken including those required by s. 173(b) Criminal Procedure Code.

Failure to do so would render the plea of guilty invalid, and in such event the question of exercising a discretion to permit an accused person to change his plea could not arise at all. A plea of guilty must be valid and unequivocal, and in order to determine the validity of a plea of guilty, the safeguards which must be followed might be stated as follows:

(i) The Court must ensure that it is the accused himself who wishes to plead guilty. Thus in *Rex v. Tan Thian Chai & Anor*. [1932] MLJ 74, Whitley J held that an accused person should plead guilty or claim to tried by his own mouth and not through his Counsel.

(ii) The Court must ascertain that the accused understands the nature and consequences of his plea.

(iii) The Court must ascertain that the accused intends to admit without qualification the offence alleged against him.

Thus, it is insufficient that the plea of guilty under safeguard (i) is unequivocal if the other safeguards are not complied with. In capital cases, for compliance with safeguard (ii), it is not sufficient for the Judge to merely and formally record that "The accused understands the nature and consequences of his plea of guilty". In *Koh Mui Keow v. R* [1952] MLJ 214, Brown J ruled that in serious cases which warrant a sentence of imprisonment, and where the charge contained one or more ingredients or question, and the accused was not represented by Counsel, each ingredient and each question involved should be explained by the Magistrate to the accused. In that case, a retrial was ordered because the appellate Judge was not satisfied that the accused had understood and admitted each and every allegation in the charge. In capital cases, we are of the view that even if the accused is represented by Counsel when he pleads guilty, there must be some indication on record to show that the accused actually knows not only the nature of his plea of guilty to the charge, i.e. the nature of the capital offence he is pleading guilty to, but also the consequences of his plea, i.e. there will be no trial and that the sentence of death may be imposed on him even though such sentence is not mandatory.

As regards the third safeguard, it is an established practice that on a plea of guilty, the prosecuting officer would supply to the Court the statement of facts constituting the offence with which the accused is charged. The statement is then read out and explained to the accused. Unless the accused admits the facts without qualification, the practice is to treat the plea as a plea of not guilty. This safeguards is of the utmost importance in serious cases. In capital cases, we suggest that the statement of facts supplied to the Court should first be read by the Judge himself to enable him to decide whether the facts alleged amount to an offence as contained in the charge. It is only when he is so satisfied, that the statement will be read out to the accused. If the accused admits the statement with qualification or if his admission is not clear or doubtful, then the Court should proceed with the trial.

Let us now consider the validity of the reasons or grounds given by the appellants for wishing to change their plea. The reasons given by the 1st appellant were that when changing his plea from not guilty to guilty on 6 April firstly, he did not understand the charge; secondly, he was not feeling well, and lastly he did not realize that he was pleading guilty to a charge which carried a death sentence. In other words the reason given was that he did not understand the nature and consequences of his plea. Although in his written grounds of judgment, the learned Judge was satisfied that both the appellants understood the nature and consequences of their plea, the notes recorded on 6 April, did not indicate at all that the appellants had been told or knew that the offence to which they had pleaded guilty carried the death sentence although it was not mandatory. They were also not told that even though the death sentence was not mandatory, in view of current sentencing policy on trafficking in hard drugs, the death penalty would be imposed in the absence of most exceptional circumstances. In our view on this ground alone, there was a breach of proper safeguards rendering the plea of guilty on the capital charge invalid. Merely because they were represented by Counsel, it could not be assumed in the circumstances that the appellants actually knew of the consequences of their plea of guilty.

With regard to the 2nd appellant, the reason advanced was that he was surprised by the statement of facts give by the DPP. In other words he did not admit the statement of facts, and even if he did, the admission was with qualification. Our first observation was that the statement of brief facts was not all satisfactory, having regard to the nature of the offence

as alleged in the charge. The statement was completely silent about the alleged commission of the trafficking offence in furtherance of a common intention under s. 34 of the Penal Code. It must be assumed that the 5,253 grammes of heroin stated in the charge was the total amount of dangerous drugs recovered from three separate places at different times viz., from the two motor cars and the wooden shed. Nor did the statement disclose what the appellants were supposed to be doing at the wooden shed the previous evening. Although the statement did not say so, it was the learned Judge himself who had to supply the missing vital link by stating in his written judgment that the appellants were engaged in manufacturing heroin. The appellants had not been given the opportunity whether to admit or deny that they were involved in the manufacture of heroin in the wooden shed, if that was supposed to be the object of the common intention. In our opinion, they were entitled to know what was the nature of the common intention alleged against them. The statement of facts did not disclose or materially reflect the offence with which the appellants were charged, and as such the appellants admission to the defective statement could not constitute a valid and unequivocal plea of guilty. Further, in mitigation of sentence, the 2nd appellant stressed the point that only 10.6 grammes of heroin were found in the motor car which he was driving and not 5,253 grammes as stated in the charge. The common intention aspect of the alleged offence was patently lacking in the statement of facts, and it was little wonder that the 2nd appellant was surprised by the DPP's statement and wished to withdraw his plea of guilty.

In capital cases, we ruled that a plea of guilty might be accepted by the Court if proper safeguards were taken to ensure that the plea was valid and unequivocal. Whether a guilty plea was valid and unequivocal was a question of mixed law and fact, but the validity of the plea must first be established before the plea could be said to be unequivocal. We also ruled that in capital cases, a trial Judge had the discretionary power to permit an accused person to change his plea at any time before sentence, but the discretion must be exercised judicially and on valid grounds. Where however the accused wished to change his plea of guilty for reasons which gave rise to a reasonable doubt as to the validity or unequivocality of the guilty plea due to failure to take proper safeguards, then the Court had no discretion but to permit the accused to retract his plea.

On the facts and circumstances of the present appeal, we were satisfied that there was a breach of proper safeguards when the plea of guilty of the appellants were accepted. There were grave doubts that the appellants understood the nature and consequences of their plea. Equally, there were grave doubts that the appellants intended to admit without qualification the offence alleged against them. In the circumstance, the appellants ought to have been allowed to change their plea of guilty to their original claim to be tried.

Accordingly, the appeal of both the appellants were allowed. The conviction was quashed and the death sentence set aside. We also ordered a retrial against the appellants before another Judge, and they were to be produced before the High Court in Penang for mention within one week to enable a new date of hearing to be fixed.

Also found at [1989] 2 CLJ 120